

The respondent and insurance carrier request the Appeals Board review the findings and conclusions of the Administrative Law Judge concerning the nature and extent of claimant's disability. That is the sole issue before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the briefs and arguments of the parties, the Appeals Board finds and concludes as follows:

For the reasons expressed below, the 40 percent permanent partial disability awarded by the Administrative Law Judge should be affirmed. The respondent alleges that claimant's disability should be limited to a scheduled injury to her right upper extremity only. In the alternative, it is respondent's contention that if it is determined that the claimant sustained a general body disability, then her work disability should be found to be less than the 40 percent awarded by the Administrative Law Judge.

Claimant was employed by respondent as a leak tester. She testified that her duties included inserting a wand into central air units to find leaks, as well as braising and soldering the ends of copper tubing inside panels. To perform these tasks, claimant was required to repetitively push, pull, twist, lift and perform frequent overhead movements with her upper extremities. Claimant further testified that it was often necessary to lift side panels weighing up to 30 pounds and to use vibratory tools. On October 5, 1992, she was lining up panels on air conditioner units and driving rivets with a powered air drill. While performing this task, claimant sustained injury to her right arm and shoulder.

The testimony of three medical doctors was taken and introduced into the record of these proceedings. All three physicians provided their opinions concerning the claimant's functional impairment and recommended physical restrictions. Both Dr. Lawrence Blaty and Dr. Ernest R. Schalchter found claimant had sustained injury to both her arm and shoulder as a result of her work-related accident. Dr. James Gluck agreed that there were abnormal findings with respect to the right shoulder, but he did not relate them directly to the claimant's October 5, 1992 accident. Based upon the record taken as a whole, the Appeals Board finds that it is more probably true than not that the claimant's right shoulder condition is a result of her work-related injury. Therefore, she is entitled to compensation based upon a general body disability.

K.S.A. 1992 Supp. 44-510e(a) provides in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than percentage of functional impairment."

The restrictions of all three physicians prevented claimant from returning to her regular job duties with respondent. The respondent was unable to accommodate her restrictions. Claimant testified that she was unable to return to any of her previous employments within those restrictions. As of the date of her regular hearing testimony, claimant was not employed.

Two vocational experts testified concerning the extent to which claimant's ability to perform work in the open labor market and to earn a comparable wage had been reduced. Mr. Jerry Hardin testified that using the restrictions recommended by Dr. Blaty, claimant's labor market loss was between 70 and 75 percent; using Dr. Schlachter's restrictions, her loss was 80 to 85 percent; and utilizing Dr. Gluck's, the labor market loss would be 70 to 75 percent. Ms. Karen Terrill testified that in her opinion the restrictions recommended by Dr. Blaty would result in a 46 percent loss in claimant's ability to perform work in the open labor market; Dr. Schlachter's restrictions would make the loss 56 percent; and utilizing Dr. Gluck's restrictions would result in a 54 percent loss. The Administrative Law Judge determined that it would be reasonable to give equal weight to the opinions of both vocational experts and to use the restrictions of all three medical experts. Averaging the loss of labor market opinions utilizing all three medical experts' opinions, the Administrative Law Judge found claimant had a 60 percent reduction in her ability to perform work in the open labor market. The Appeals Board agrees with the approach taken by the Administrative Law Judge in this case. However, by averaging these opinions, the Appeals Board finds the claimant's labor market loss to be 63 percent.

With regard to the extent to which the claimant's ability to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, Mr. Hardin opined that the claimant retained the ability to earn approximately \$200.00 per week. Ms. Terrill was of the opinion that claimant retained the ability to earn the same \$6.25 per hour wage that she earned with respondent. Furthermore, as the claimant was not restricted from working in excess of 40 hours per week by any of the physicians, she retained the ability to work the same amount of overtime that she had performed while working for respondent. In the opinion of Ms. Terrill, the types of jobs for which claimant was qualified and which, in her opinion, would pay a comparable base wage, would also afford claimant with the opportunity to work overtime and earn an average gross weekly wage comparable to that which she received from respondent. The Appeals Board understands, therefore, Ms. Terrill's opinion to be that claimant has sustained no loss in her ability to earn comparable wages.

The Administrative Law Judge found that the claimant retained the ability postinjury to work full time at a minimum wage job which he found would give her a postinjury wage of \$200.00 per week. The Administrative Law Judge then compared this postinjury wage-earning ability of \$200.00 per week to \$250.00 per week, which he found to be the claimant's average weekly wage at the time of her injury. That calculation resulted in his finding of a 20 percent reduction in claimant's ability to earn a comparable wage. The Administrative Law Judge was apparently unaware of the parties' stipulation to an average gross weekly wage of \$311.22. This stipulation included both claimant's average weekly overtime earnings of \$61.22 and her base wage of \$250.00. Claimant argues, and the Appeals Board so finds, that when the stipulated average weekly wage of \$311.22 is compared to the \$200.00 per week which Mr. Hardin testified to as being claimant's postaccident wage-earning ability, the loss is approximately 35 percent.

The Appeals Board finds from the evidence in this case that the opinions of both vocational experts should be given equal weight. Averaging the 35 percent loss of wage-earning ability found by Mr. Hardin with the zero percent loss found by Ms. Terrill, results in a labor market loss of approximately 17 percent.

The Administrative Law Judge applied the formula approved by the Kansas Supreme Court in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990)

and, by giving equal weight to the reduction in ability to perform work in the open labor market with the reduction in ability to earn comparable wage, found the claimant's permanent partial general disability to be 40 percent. The Appeals Board considers this finding and conclusion to be reasonable and appropriate and adopts same as its own. The Appeals Board further approves and adopts the other findings and conclusions of the Administrative Law Judge as set forth in his Award of September 28, 1995 as if specifically set forth herein to the extent they are not inconsistent with the specific findings and conclusions expressed herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated September 28, 1995 should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Patricia S. Collins-Morfitt, and against the respondent, Evcon Industries, and its insurance carrier, St. Paul Fire and Marine Insurance, for an accidental injury which occurred October 5, 1992, and based upon an average weekly wage of \$311.22, for 11 weeks of temporary total disability compensation at the rate of 207.49 per week or \$2,282.39, followed by 404 weeks at the rate of \$83.00 per week or \$33,532.00 for a 40% permanent partial general body disability making a total award of \$35,814.39.

As of January 31, 1996, there is due and owing claimant 11 weeks of temporary total disability compensation at the rate of \$207.49 per week or \$2,282.39, followed by 162.43 weeks of permanent partial disability compensation at the rate of \$83.00 per week in the sum of \$13,481.69, for a total of \$15,764.08 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$20,050.31 is to be paid for 241.57 weeks at the rate of \$83.00 per week, until fully paid or further order of the Director.

The Appeals Board otherwise approves and adopts the remaining orders entered by the Administrative Law Judge as set forth in his September 28, 1995 Award.

IT IS SO ORDERED.

Dated this ____ day of January 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David H. Farris, Wichita, KS

W. John Badke, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director